

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number <u>88-10529</u>
CHARLES F. SMITH	)	
	)	
Debtor	)	
	)	
JAMES D. WALKER, JR.	)	
	)	
Trustee/Plaintiff	)	
	)	
vs.	)	Adversary Proceeding
	)	Number <u>88-1064</u>
CHARLES FREDERICK SMITH	)	
	)	
First Defendant	)	
	)	
MET FIRST FINANCIAL	)	
	)	
Second Defendant	)	
	)	
BLAZER FINANCIAL SERVICES, INC.	)	FILED
	)	at 4 O'clock & 51 min. P.M.
Third Defendant	)	Date: 8-2-89
	)	
JEWELL B. LAFAVOR, FORMERLY	)	
JEWELL B. SMITH	)	
	)	
Fourth Defendant	)	
	)	
LEE JERNIGAN & SON, INC.	)	
	)	
Fifth Defendant	)	
	)	
and	)	
	)	
METROPOLITAN LIFE INSURANCE	)	
COMPANY	)	
	)	

Sixth Defendant )

ORDER

Plaintiff, James D. Walker, Jr., as trustee for the Bankruptcy Estate of Charles Frederick Smith, filed this adversary proceeding against the above-named defendants to recover an alleged fraudulent transfer as defined under §548 and §550 of Title 11 of the United States Code. The fifth defendant, Lee Jernigan & Son, Inc., the second defendant, Met First Financial, and the sixth defendant, Metropolitan Life Insurance Company, have moved for summary judgment in their favor in this action. The court, after considering the defendants' motions, arguments of counsel, and briefs submitted by the parties, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Either the second defendant, Met First Financial, or the sixth defendant, Metropolitan Life Insurance Company, instituted non-judicial foreclosure proceedings against the real property owned by the first defendant and debtor in the underlying bankruptcy case (No. 88-10529), Charles Frederick Smith, and the fourth defendant, Jewell B. LaFavor, formerly Jewell B. Smith. The property is located at 827 Brookfield Parkway, Martinez, Georgia.

2. The third defendant, Blazer Financial Services, Inc. held a second mortgage on the property prior to the foreclosure proceedings.

3. On April 5, 1988, the first mortgage holder, sixth defendant, Metropolitan Life Insurance Company, sold the property at public auction.

4. At the auction, the fifth defendant, Lee Jernigan and Son, Inc. (Jernigan), was the high bidder and tendered the sum of Thirty-Seven Thousand One Hundred Twenty-Three and No/100 dollars (\$37,123.00) as the purchase price of the property. Defendant, Metropolitan Life Insurance Company, executed a deed to Jernigan dated the day of the sale.

5. On May 3, 1988, third defendant, Blazer Financial Services, Inc., filed an involuntary petition under Chapter 7 of the United States Bankruptcy Code against the first defendant, owner of the property before the foreclosure sale, Charles Frederick Smith. On May 23, 1988, Smith consented to the Chapter 7 petition.

6. More than four months passed from the time of the foreclosure sale, and Metropolitan Life failed to provide Jernigan with the deed to the property that was the subject of the foreclosure sale. The parties do not agree as to the reason for the delay in delivering the deed.

7. Metropolitan Life Insurance Company recorded the

deed on August 25, 1988, in the Office of the Clerk of Superior Court for Columbia County, Deed Book 690, pages 248-249, and mailed the recorded deed to Jernigan by letter dated September 9, 1988. When

the deed was received by Jernigan, Jernigan quit-claimed the property back to Metropolitan Life by quit-claim deed dated September 21, 1988 and recorded on September 22, 1988, refusing to "accept" the original deed.

8. At some point, the exact date unknown to this court, Jernigan filed suit against Metropolitan Life Insurance Company, in the United States District Court for the Southern District of Georgia, civil action No. 188-212.<sup>1</sup>

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<sup>1</sup>The movants contend that the order granting the motion for summary judgment filed by Jernigan, plaintiff in the district court action has made the issues in this adversary proceeding res judicata as to them. However, no party to this adversary proceeding has provided this court with copies of the relevant portions of the record from the district court proceedings. The order from the district court, a copy of which was attached to Jernigan's brief filed with this court on June 13, 1989, indicates that the district judge did in fact grant summary judgment in favor of the plaintiff, Jernigan, and against defendant, Metropolitan Life Insurance Company "[f]or the reasons stated on the record in that hearing," but the order does not set forth the basis of the cause of action or the reasons for the summary judgment. No party urging that the order makes all issues in this adversary proceeding res judicata as to Jernigan has provided this court with a copy of the transcript of the hearing.

Collateral estoppel or issue preclusion, the doctrine of res judicata relied on by movants, requires that "the contested issue must have been litigated and necessary to the judgment earlier rendered." Kasper Wire Works v. Leco Engineering and Machinery, 575 F.2d 530, 535 (5th Cir. 1978). This court cannot make such a determination from the evidence and pleadings now before it and cannot give the district court order any res judicata effect.

## CONCLUSIONS OF LAW

In order for the court to grant a judgment as a matter of

law, it must appear from the record and evidence before the court that no genuine issue of material fact exists for trial. Fed. R. Civ. P. 56; Bankruptcy Rule 7056; Palmer v. BRG of Georgia, 874 F.2d 1417 (11th Cir. 1989). The party moving for summary judgment bears the burden of demonstrating that no genuine dispute exists as to any material fact. Amey, Inc. v. Gulf Abstract & Title Inc. 758 F.2d 1486 (11th Cir. 1985). "In determining whether the movant has met its burden, the reviewing court must examine the evidence in a light most favorable to the opponent of the motion (citations omitted). All reasonable doubts and inferences should be resolved in favor of the opponent [to the summary judgment motion]." Id.

The movants contend that the undisputed facts of this case are:

- 1) the bankruptcy petition of Charles F. Smith was filed on or about May 3, 1988; and

- 2) that the property which was the subject of the foreclosure sale was not transferred to Jernigan within one year prior to the date of the petition. However, the record does not support a conclusion that no genuine issue of material fact

remains for trial. No dispute exists as the date of the petition, but the very basis of this adversary proceeding is that the property was transferred within one year of the petition.

The facts before the court demonstrate that one of the defendants conducted a valid foreclosure sale, and Jernigan, the high bidder at the sale, paid to the holder of the first mortgage on the property, Metropolitan Life Insurance Company, the full amount of the purchase price. A period of time elapsed before the deed to the property was recorded and forwarded to defendant, Jernigan, but the basis and extent of the delay have not been established.

As a matter of state law, in order for a conveyance of land to be valid, the deed "must be in writing, signed by the maker, and attested by at least two witnesses." Official Code of Georgia Annotated §44-5-30.<sup>2</sup> The deed must also be "delivered to the purchaser or his representative and be made on good or valuable consideration." Id. The only argument which the movants have put forward in this action to defeat a valid conveyance is that the deed to the property in question was never delivered. Movants contend that by state law in order for a deed to have been "delivered," the receiver of the property must have "accepted" the deed. Jernigan contends that because it returned the deed and quit-claimed any of its interest in the premises back to

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<sup>2</sup>Henceforth all references to the Official Code of Georgia Annotated are O.C.G.A. §.

defendant, Metropolitan Life Insurance Company, it never "accepted" the deed as required by state law. Therefore according to the movants' argument, the deed was never "delivered", and no valid conveyance of the property occurred.

This court, however, concludes as a matter of law that the facts before the court could demonstrate a valid conveyance of the property. Whether the facts presented constitute delivery of a deed is a question of law to be resolved by the court. Stinson v. Daniel, 193 Ga. 844, 20 S.E. 2d 257 (1942) The foreclosure sale and the acceptance of the highest bid extinguished the debtor's right to redeem the property under state law. See Sanders v. Amsouth Mortgage Company, No. 488-0079 (Bankr. S.D. Ga. June 12, ' 1989). The acceptance of the bid by the foreclosing party formed a contract to buy and to sell. Federal Deposit Insurance Corp. v. Dye, 642 F.2d 837 (5th Cir. 1981).<sup>3</sup> The full amount of the agreed to purchase price was paid by the purchaser,

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<sup>3</sup>The Eleventh Circuit adopted all decisions rendered by the former Fifth Circuit before October 1, 1981, as binding precedent in this circuit. Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981).

The Dye opinion analyzed whether a challenged foreclosure sale was either void or in the alternative never consummated so as to allow the FDIC to sue for the outstanding balances due on the notes which were secured by the real property in question. The Fifth Circuit reasoned that until a deed was transferred and consideration passed, no actual sale had occurred, but there existed a contract to buy and to sell. The facts of Dye are substantially different from the facts in this adversary proceeding because the consideration (the purchase money) had passed, and the deed was transferred. In addition, the Dye opinion dealt with the right of a secured creditor to seek a deficiency judgment after a sale which is not the basis of this adversary proceeding.

and the seller executed and recorded a deed. From the facts taken in a light most favorable to the party opposing summary judgment, it appears that all of the

elements necessary for a valid conveyance, as set forth in O.C.G.A. §44-5-30, have been met.<sup>4</sup>

There remains for trial the resolution of whether the delay in delivering the deed constituted nonperformance by the seller to an extent to allow the purchaser to rescind the contract. See O.C.G.A. §13-4-62. The movants have merely asserted that they attempted to rescind the contract at some point, but presented no evidence as to the date of their efforts or the basis for attempting to rescind the contract, except the delay in the delivery of the deed. If following the foreclosure auction there remained a mere contract to sell, there is no evidence presented indicating the terms of the contract. The court cannot, at this point, conclude that there was material breach of that contract because of the delay in delivering the deed. Whether the facts established a basis for rescinding the contract to buy and sell remains a genuine issue for trial, as does the question of whether a rescission actually occurred before the deed to the property was executed, recorded, and forwarded to Jernigan, i.e.

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<sup>4</sup>The deed could have been recorded even though the debtor had filed a petition under Chapter 7 provided the valid foreclosure sale had occurred before the petition was filed. The stay of 11 U.S.C. 362 did not prevent the recording of the deed. See Sanders, No. 488-0079 (Bankr. S.D. Ga. June 12, 1989).



delivered and the contract completed. These facts remain in dispute, and summary judgment is not appropriate at this time.

Therefore IT IS HEREBY ORDERED that the motion for summary judgment filed by fifth defendant, Lee Jernigan and Son, Inc., and the co-motions for summary judgment filed by the second defendant, Met First Financial, and the sixth defendant, Metropolitan Life Insurance Company, are hereby denied.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 2nd day of August, 1989.